

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL NANCE,)
Petitioner,)
v.) No. 21-439
TIMOTHY C. WARD, COMMISSIONER,)
GEORGIA DEPARTMENT OF CORRECTIONS,)
ET AL.,)
Respondents.)
- - - - -

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1 P R O C E E D I N G S

2 (11:50 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case Number 21-439, Nance
5 against Ward.

6 Mr. Hellman.

7 ORAL ARGUMENT OF MATTHEW S. HELLMAN

8 ON BEHALF OF THE PETITIONER

9 MR. HELLMAN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Mr. Nance's claim sounds in
12 Section 1983 because it is a claim about how the
13 state may execute him, not a claim that the
14 state cannot execute him. That simple
15 proposition decides this case, and, indeed, when
16 the case began, Respondents did not dispute it.

17 Respondents' new contention that some
18 method of execution cases sound in habeas is
19 wrong, wrong about the scope of the writ, wrong
20 about the scope of Section 1983, and wrong under
21 this Court's method-of-execution case law.

22 Proposing a non-statutory method of
23 execution is proposing a method of execution.
24 By its very nature, the claim does not attack
25 the validity of the death sentence, which places

1 it squarely on the 1983 side of the line that
2 this Court has demarcated.

3 And that is particularly so because
4 Mr. Nance is required to prove that the state
5 has a feasible and readily available alternative
6 means of carrying out the execution. It would
7 stretch habeas beyond recognition to hold that
8 it applies to a claim that not only concedes the
9 validity of the sentence but proves that the
10 state has a feasible means of carrying it out.

11 Respondents, of course, are free to
12 dispute the feasibility of the firing squad as
13 an alternative method, but that feasibility
14 analysis is part of the Section 1983 merits
15 inquiry, just as it is with the feasibility
16 inquiry for any other proposed method.

17 Any other result would mire
18 method-of-execution litigation in threshold
19 questions about whether a proposed alternative
20 is truly non-statutory. The result would be
21 confusion, delay, and arbitrariness.

22 More than that, Respondents' rule
23 would close the courthouse doors to the very
24 claim that all nine members of the Bucklew Court
25 held should not be unduly difficult to bring.

1 With that, I welcome the Court's
2 questions.

3 JUSTICE THOMAS: Could a state write
4 into legislation that -- for certain crimes,
5 that the execution would be, for example, only
6 lethal injection?

7 MR. HELLMAN: It is possible to
8 imagine a state law that -- that does that.
9 That is not what Georgia law does, but I do
10 think if the state -- and this would be the
11 first state that we are aware of to do that --

12 JUSTICE THOMAS: Well, let's just say
13 a state, in response to this confusion, writes
14 it into their statute, capital crime, that there
15 is to be a specific form of execution.

16 MR. HELLMAN: I do think that would
17 present a different case, Your Honor, but if I
18 may, what Georgia does is different and typical
19 of state practice. When Georgia changes its
20 method of execution, for example, when it went
21 from electrocution to lethal injection, no one
22 on death row was resentenced.

23 And that is because Georgia law, like
24 every other state law that we're aware of,
25 treats the method as different from the method

1 of execution -- from the death sentence itself.
2 And the state has good reasons for doing that.
3 That is not an accident.

4 If changing the method of execution
5 invalidated the sentence and required a new
6 sentence, that could have collateral effects,
7 such as reopening post-conviction review or
8 retroactivity analysis.

9 So that's fine if the state does it
10 that way, but they can't have it both ways.

11 JUSTICE THOMAS: Well, and -- and from
12 your standpoint, if you -- the argument you're
13 making now is, of course, the firing squad. If
14 Georgia agrees with you and accedes to -- to
15 your request, would you be foreclosed from
16 arguing another method-of-execution challenge or
17 having another method-of-execution challenge
18 with respect to the firing squad?

19 MR. HELLMAN: Yes, Your Honor. If we
20 --

21 JUSTICE THOMAS: You would be
22 foreclosed?

23 MR. HELLMAN: Well, if I -- if I may
24 explain, we are proposing the firing squad as
25 our alternative method. We will prove that it

1 is feasible and readily available. That's our
2 burden. And in the process of doing that, if
3 the case were to go forward on that basis, we
4 would establish a method. If the state uses
5 that method, yes, we -- we may not challenge it
6 on -- on -- on -- as you are saying.

7 JUSTICE SOTOMAYOR: Counsel, to
8 unpackage what you said, as far back as 1915, in
9 the Malloy case, we said that a method of
10 execution is not part of a sentence, correct?

11 MR. HELLMAN: Correct, Your Honor.

12 JUSTICE SOTOMAYOR: And so a change
13 from one form of execution to another doesn't
14 affect the sentence?

15 MR. HELLMAN: That is correct.

16 JUSTICE SOTOMAYOR: That's why we said
17 you don't have to resentence someone.

18 MR. HELLMAN: Correct, for ex post
19 facto conclusions, yes, Your Honor.

20 JUSTICE SOTOMAYOR: So there is some
21 language in some of our cases that the other
22 side relies upon that says when there is a
23 duration -- a challenge to the duration of the
24 sentence, that that has to go into habeas.

25 No judgment of execution that I'm

1 aware of issued by a court says you have to be
2 sentenced to death on such and such a date,
3 correct?

4 MR. HELLMAN: That is correct. And
5 even -- I'm aware of situations in which a date
6 is included, but that is not -- that date can
7 change without requiring resentencing.

8 JUSTICE SOTOMAYOR: Exactly.

9 MR. HELLMAN: Yes.

10 JUSTICE SOTOMAYOR: And so there -- as
11 far as I'm concerned, are you aware of any legal
12 impediment, constitutional or otherwise, that
13 would prevent the Georgia -- Georgia from
14 amending its law to permit execution by firing
15 squad?

16 MR. HELLMAN: I'm -- no, Your Honor.
17 There -- there's no impediment I'm aware of in
18 the way that you phrase it.

19 JUSTICE SOTOMAYOR: All right. And so
20 just like a regulation can be changed --

21 MR. HELLMAN: Correct.

22 JUSTICE SOTOMAYOR: -- by prison
23 officials not to cut down someone's vein, and we
24 had a case that says that's permissible --

25 MR. HELLMAN: Correct.

1 JUSTICE SOTOMAYOR: -- under habeas --
2 under habeas, Georgia could do what it chooses
3 to do in terms of finding a viable method of
4 execution?

5 MR. HELLMAN: That's what makes it a
6 1983 claim, Your Honor, because the claim isn't
7 that he can't be executed. The claim is a how
8 question. What manner? That is correct.

9 JUSTICE SOTOMAYOR: Thank you.

10 JUSTICE ALITO: Your argument is that
11 this does not preclude execution because Georgia
12 could enact a new statute, right?

13 MR. HELLMAN: That is one argument,
14 yes, Your Honor.

15 JUSTICE ALITO: What if the state
16 constitution said that the only permissible
17 method of execution is lethal injection? Would
18 you make the same argument, well, the state
19 constitution could be amended?

20 MR. HELLMAN: It would still be a 1983
21 claim, Your Honor, because habeas is about
22 claims that say the sentence is invalid. In
23 that case, there would be a question as to how
24 feasible this alternative would be. But that
25 would be part of the 1983 analysis, just as it

1 is with our claim or some other -- some other
2 proposed method.

3 JUSTICE ALITO: I mean, you're taking
4 things very far when you say that. Amending a
5 constitution is not an easy thing. I mean, some
6 constitutions, like the federal Constitution,
7 are extraordinarily difficult to amend, but you
8 would say, well, it doesn't matter because, in
9 theory, it could be done?

10 MR. HELLMAN: Well, two parts. One,
11 the question is what is the habeas writ, and
12 this isn't about invalidating a sentence. But
13 then, to the feasibility point that you are --
14 you are talking about, the only way a claimant
15 gets relief under the Eighth Amendment standard
16 is to show that his proposed alternative is
17 feasible and readily available.

18 So, if he can't --

19 JUSTICE ALITO: No, I understand that.
20 But I'm -- it's the issue of -- of how that --
21 how that claim is to be raised, whether it's in
22 habeas or whether it's in federal habeas or
23 under 1983. Of course, it can be done under
24 state law.

25 Suppose state law provided that if the

1 state -- if there is a change in the prescribed
2 method of execution, the defendant has to be
3 resentenced.

4 Would your answer be the same there?

5 MR. HELLMAN: I think that gets to
6 Justice Thomas's hypothetical where he --
7 because it's functionally the same kind of
8 question, where a state for the first time to
9 our knowledge does make the method in some way,
10 some -- in the important way part of the
11 sentence.

12 I suppose that could be a different
13 case, but, again, states don't do that as a
14 matter of practice because they don't want to
15 have a resentencing when the method is changed.
16 And so --

17 JUSTICE ALITO: What if the -- what if
18 the state law was that if there's a change in
19 the method of execution, there must be a new
20 guilt-phase trial? I mean, I'm trying to
21 understand how far your argument would go,
22 and -- and I think what you're -- what you're --
23 what would you say about the guilt-phase
24 argument?

25 MR. HELLMAN: If the guilt -- if the

1 conviction -- it's -- if I understand your
2 question, is overturned or vacated, then that is
3 -- under the Court's 1983 versus habeas line,
4 that -- that -- that would be a habeas case, but
5 that is not what -- obviously what we have here.

6 And, again, I appreciate the question
7 of how far the principle goes, but the answer, I
8 think, under this Court's cases is that if you
9 are contending that you cannot be executed,
10 there is no method, the death penalty is
11 unconstitutional, the death penalty is
12 unconstitutional as applied to me, the claimant,
13 that is habeas.

14 If it's a question of how the death
15 penalty is to be administered, there's a
16 question of the feasibility of the alternative,
17 but that's just grist for the 1983 inquiry.

18 JUSTICE ALITO: Well, let me just ask
19 one more. I mean, you gave to start out a
20 number of question -- a number of answers to
21 questions by Justice Sotomayor about what could
22 be done, you can split it, et cetera, et cetera.
23 Aren't those all questions of Georgia law?

24 I mean, Georgia law could say you
25 can't split it, you can split it, you can't

1 change the method, you -- you may change the
2 method. Isn't that completely up to the state?
3 And what do we know about -- what answers are
4 there to any of those questions?

5 I mean, you said in one of the
6 footnotes in your reply brief that under Georgia
7 law, a change in the method of execution doesn't
8 require anything other than the use of the new
9 method. But there's no case that holds that
10 that I -- you didn't cite one anyway.

11 MR. HELLMAN: Let me see if I can
12 attempt to respond to your question.
13 Ultimately, what we have here is a question of
14 federal law because the scope of habeas --
15 federal habeas and the scope of Section 1983 are
16 federal questions.

17 And we know from the Malloy case, as
18 Justice Sotomayor referred to, that simply going
19 from one punishment to another, at least without
20 more, doesn't present an ex post facto concern.

21 The scope of what state law does, I
22 suppose, could vary in some other state, but as
23 to what Georgia law does, there's no question.

24 And I point the Court to the Dawson
25 case, which we do talk about in our briefs,

1 which -- in which the argument was made because
2 the state was moving from electrocution to
3 lethal injection, there was a contention
4 actually made by the state, I believe, in that
5 case that resentencing -- that -- that it was a
6 challenge to the death penalty itself.

7 And the Court said no, that is not the
8 case as a matter of Georgia law. The method is
9 separate from the death sentence. And that is
10 in keeping as -- the ACLU brief actually has an
11 extensive discussion of quite a few states, all
12 of whom changed their method of execution
13 without engaging in a resentencing.

14 So I think -- I think the -- the --
15 the federal law aspect of this is clear as well
16 as the -- how -- how state law plays into that.

17 CHIEF JUSTICE ROBERTS: How -- how
18 does Georgia's method of execution -- how is
19 that set?

20 MR. HELLMAN: Georgia's method of
21 execution is first a -- a statutory matter that
22 is then -- the Department of Corrections has
23 policies and procedures that implement that
24 method.

25 CHIEF JUSTICE ROBERTS: And so they --

1 they would have to change the statute itself?

2 MR. HELLMAN: Well, to adopt -- I
3 believe, to adopt the firing squad, that might
4 well require a statutory amendment. But let me
5 -- I think this is a -- a good time to raise a
6 second part about the argument because I think
7 it gets lost in some of the back and forth
8 between the parties.

9 The firing squad is our proposed
10 alternative. We are not aware of any method of
11 lethal injection that would be constitutional as
12 to Mr. Nance. But, although we are required to
13 prove that there is a feasible alternative
14 readily available to the state, that is not the
15 alternative the state is obligated to obtain or
16 obligated to use in the case.

17 The state can carry out Mr. Nance's
18 execution by any legal method. And if the state
19 were able to come up with a new method --

20 CHIEF JUSTICE ROBERTS: Without regard
21 to the current statute?

22 MR. HELLMAN: As a matter of Eighth
23 Amendment law, Georgia may carry out -- may use
24 any lethal method.

25 CHIEF JUSTICE ROBERTS: But not -- but

1 not as a matter of Georgia law?

2 MR. HELLMAN: I think as for Georgia
3 law, they have a statutorily authorized method,
4 which is lethal injection. What I was talking
5 -- so -- so I believe to -- to -- to not use
6 lethal injection would require amendment.

7 However, what -- my point was that
8 just because we propose an alternative that
9 would require that, it doesn't mean that Georgia
10 is required to adopt that alternative, and, in
11 fact, if they were able to come up with a method
12 of lethal injection that was constitutional,
13 they could use it, which I think shows the
14 distinctions my friends are trying to draw on
15 the other side are illusory.

16 They want to say, because you proposed
17 a non-statutory method, this is -- now we're
18 on -- on to the habeas track, but the case won't
19 necessarily end up with a non-statutory method
20 being adopted.

21 If Georgia has a constitutional method
22 of lethal injection, which we are not aware of,
23 but as a legal matter, they are not foreclosed
24 from using it by any relief that we would be
25 able to obtain. And so to have these questions

1 turn on speculation as to what method might
2 ultimately be adopted and to take our proposal
3 and assume that is the one the state might use
4 is -- is -- is incorrect.

5 JUSTICE KAVANAUGH: You -- you make
6 forceful arguments about why 1983 is the
7 appropriate mechanism here. But, if this --
8 suppose it's in a gray area, and we basically
9 have a -- a choice of which way to proceed here.
10 And suppose relevant to that choice are the
11 practical considerations of how this will play
12 out under 1983 versus habeas in the future.

13 The other side, I think, says the 1983
14 route is too susceptible to delay, gamesmanship,
15 those kinds of things. I wanted to give you an
16 opportunity to respond to that.

17 MR. HELLMAN: I -- I appreciate that,
18 Justice Kavanaugh. With respect, I think it's
19 just the other way around. And I'll -- and I'll
20 take the defense part first and then talk about
21 the problems with their --

22 JUSTICE KAVANAUGH: Yeah, both.

23 MR. HELLMAN: -- their method. Yes.

24 JUSTICE KAVANAUGH: Yeah.

25 MR. HELLMAN: Courts with Section 1983

1 have all the tools they need to deal with
2 dilatory claims, estopped claims, claims that
3 require a stay but aren't entitled to one
4 because the prisoner comes too late or without a
5 showing of likelihood of success.

6 JUSTICE KAVANAUGH: In fact, the
7 district court here ruled against you on that
8 ground, right?

9 MR. HELLMAN: In fact, the district
10 court ruled against us on that ground.

11 JUSTICE KAVANAUGH: Keep going. Okay.

12 MR. HELLMAN: The one appellate judge
13 that looked at it thought that we had stated a
14 claim, but, yes --

15 JUSTICE KAVANAUGH: Yeah.

16 MR. HELLMAN: -- the district court
17 did rule against us on that ground.

18 So 1983 has -- offers courts all the
19 tools they need to deal with this. But, if you
20 adopt their rule, then, at the start of every
21 case, there will be a question about whether the
22 proposed alternative is truly non-statutory, and
23 that gets complicated quickly for a variety of
24 reasons, some that we raise in our brief and
25 some of which become clear from my friend's

1 position.

2 As we talk about, for example, many
3 lethal injection statutes prescribe specific
4 drugs as well as similar drugs -- similar drugs.
5 What is a similar drug?

6 If a proposal is equally as effective,
7 readily available, feasible but not similar,
8 then it's apparently a habeas claim. And you
9 might not know that from the initial papers in
10 the case. It might require fact finding. It
11 might require querying as to what a similar drug
12 is. That's one example of something that might
13 get decided and go back up and go back down with
14 ramifications for whether the claim needs to be
15 exhausted for habeas purposes.

16 And then I'll only point out that
17 my -- my friend's test for non-statutory seems
18 to be whether the warden could implement the
19 alternative himself or herself.

20 And there are, as we talked about in
21 the briefing, many questions often where a
22 proposed alternative drug is given as the
23 alternative, but it might require licensing by a
24 federal government or -- or some other state
25 actor, not the Department of Corrections, to

1 approve the use of the drug.

2 All of those questions would define
3 the cause of action with jurisdictional
4 consequences, exhaustion consequences. And to
5 -- to load all of that into an inquiry that has
6 been clear for quite some time, with Justice
7 Scalia's opinions about 1983 versus habeas, they
8 tell you what the right answer is to that.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 JUSTICE THOMAS: Nothing for me,
13 Chief.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer?

16 Justice Alito, anything further?

17 JUSTICE ALITO: I do want to ask you a
18 question or two about the second issue, about
19 the second and successive issue.

20 Could you just state in general terms
21 what rule you would like us to adopt with
22 respect to -- to determine whether a -- a
23 petition is second or successive?

24 I know you think this is like Panetti,
25 but can you express it in -- in more general

1 terms?

2 MR. HELLMAN: Yes. We would have the
3 Court follow the two-step inquiry that Banister
4 articulates based on the cases.

5 Question one would be whether the
6 claim is an abuse of the writ, which would look
7 at whether it was abandoned, whether it was ripe
8 at the time of the first habeas.

9 And then Question -- then step two
10 really does focus on the unique aspect or the --
11 I shouldn't say unique -- nearly unique aspect
12 of this kind of claim.

13 Like a Ford claim, which says that it
14 is unconstitutional to execute those who are
15 incompetent to understand the punishment that is
16 being handed down by the state, this claim too
17 assumes that the state, to meet the Eighth
18 Amendment standard here, is employing a method
19 of punishment that super adds pain for no
20 penological reason where there is a feasible and
21 readily alternative -- readily available method
22 at hand.

23 JUSTICE ALITO: All right. Well, the
24 second part picks up on the statement in
25 Panetti -- I won't be able to give you a direct

1 quote -- but Panetti said this is basically a --
2 a -- a one-off. This is a unique situation.

3 And now you say, well, this is another
4 unique situation. Okay. That's a possibility.
5 But, as to the first part, if we say second or
6 successive means pre-AEDPA abuse of the writ,
7 that's a big change, isn't it? You think that's
8 -- you think that's what Congress meant when it
9 enacted AEDPA?

10 MR. HELLMAN: I think --

11 JUSTICE ALITO: We have all that old
12 law. I thought AEDPA was intended to get rid of
13 a lot of that.

14 MR. HELLMAN: I think step one is a
15 door that a claimant to be successful has to
16 pass through, and if that were the only door,
17 that would be a sea change in how we understand
18 the relationship of AEDPA to -- to -- to these
19 kinds of claims.

20 But there's a second step, and that
21 step really is one that only a few claims will
22 be able to take.

23 JUSTICE ALITO: Okay. And what is it
24 about those claims? So, if it's not just abuse
25 of the writ, purposeful neglect, what -- what is

1 it about the -- what happens at the second door?

2 MR. HELLMAN: Just as the Court in
3 Panetti took the view that Congress did not mean
4 to deprive claimants of relief where their
5 claims weren't ripe earlier and the claim itself
6 involved the unconstitutional execution -- we'll
7 assume concededly unconstitutional execution --
8 this claim too presents that in a way that
9 because of the Eighth -- demanding Eighth
10 Amendment standard, really does, I -- I submit,
11 put it in stark relief and is equivalent to the
12 kind of claim that Ford thought or Panetti
13 thought was different from not just the
14 run-of-the-mill case but the -- the cases
15 generally in this area.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: Counsel, you're
19 not emphasizing what I see as the key reason
20 that this is similar to the other cases. It's
21 the ripeness issue. Banister spoke about the
22 test being whether it would have been considered
23 an abuse of -- of the writ for a new set of
24 facts to lead to a -- a -- a constitutional
25 violation.

1 As in Ford, the issue is are you
2 competent at the moment you're going to be
3 executed. And many cases are -- are dismissed
4 by courts below because the mental condition has
5 been around for years and there was delay. That
6 could happen here too, as it appears to have
7 happened in the district court's view.

8 But putting that aside, it's the
9 ripeness question, isn't it, but ripeness in
10 terms of this is something that develops after,
11 generally develops after?

12 MR. HELLMAN: That -- that is a
13 necessary component of it and an important
14 component of it, but I just want to be clear it
15 is not the only component of the test that --
16 that we're talking about today. But, yes,
17 that's quite correct.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: Mr. Hellman, I -- I
20 understand that you think that there needs to be
21 a way to bring this claim somehow. But, as
22 between these two ways of bringing the claim,
23 the 1983 way and the habeas way, which would be
24 essentially saying don't worry about the second
25 and successive bar, is there any difference from

1 your point of view?

2 MR. HELLMAN: Yes, both for Mr. Nance
3 and -- and in terms of coming up with an
4 administrable system, there are important
5 differences. The -- and -- and they dovetail in
6 many ways.

7 If it's done via habeas, the
8 administrability problems become quite difficult
9 because then you will have questions about
10 whether or not this claim, once it's been
11 determined to be a truly non-statutory
12 alternative to pose the kind of -- that meets
13 the test that Respondents are -- are laying out,
14 then you might have to go back to state court
15 and there would be exhaustion questions.

16 There would be, to the extent that
17 there's a determination, the AEDPA standards
18 apply to -- to -- to that review. So, yes, we
19 -- we -- 19 -- 1983 is the right cause of action
20 under this Court's cases because it doesn't --
21 just because we're talking about what voids the
22 judgment. And a claim that voids the judgment
23 goes to habeas and this kind of claim does not.

24 But it is true that habeas claims
25 often carry procedural questions and different

1 standards of review that make those claims --
2 that -- that -- that up the administrability
3 difficulties that we've been talking about.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 JUSTICE GORSUCH: I'd like to pursue
7 that just a little bit further with you. And,
8 certainly, if -- if -- if AEDPA were to control,
9 you'd have to go to state court in the first
10 instance and review in federal court would be
11 more limited.

12 But I wonder whether -- how that cuts
13 -- and this kind of gets to Justice Kavanaugh's
14 point too, which is we've said that if you're
15 going to seek a shortening of your sentence,
16 you've got to go to habeas.

17 MR. HELLMAN: Correct.

18 JUSTICE GORSUCH: And, here, you're
19 putting the state to a choice of either changing
20 its law or being frustrated in its ability to
21 carry out a lawful judgment.

22 And why isn't that exactly the sort of
23 thing, that federalism concern that animated
24 AEDPA, indicate to us -- why isn't that a signal
25 that the right place to think about this case is

1 that state courts should have the opportunity to
2 address these questions in the first instance
3 under AEDPA?

4 MR. HELLMAN: I think the reason that
5 isn't the right way to think about it is, as
6 Justice Scalia artfully put it in the Wilkinson
7 concurrence, to -- to Justice Breyer's decision
8 for the Court in that case, the question for
9 habeas is it's a narrow writ.

10 The question of what happens once
11 you're in habeas, there are lots of hurdles
12 there. No doubt about it. But you've got to
13 get to habeas before all of that applies.

14 So the question is, what is the scope
15 of the writ? And I know the Court doesn't
16 necessarily agree a hundred percent about what
17 the scope of the writ is looking at a case from
18 earlier this week, but I think everyone agrees,
19 and Justice Scalia certainly explained for the
20 Court, it has to -- a -- a claim about habeas,
21 the proper ways in habeas, has to attack the
22 validity of the death judgment.

23 This claim does not do that.
24 Method-of-execution claims do not do that. And
25 so, by -- and they don't even --

1 JUSTICE GORSUCH: You -- you'd agree
2 it puts the state to the choice of either
3 changing its law or changing its sentence?

4 MR. HELLMAN: No, I don't agree with
5 that.

6 JUSTICE GORSUCH: You don't agree with
7 that?

8 MR. HELLMAN: I don't agree with that.

9 JUSTICE GORSUCH: How -- how else
10 could Georgia proceed in this case?

11 MR. HELLMAN: Well, our proposal, the
12 one that we think is feasible and readily
13 available, is -- is the firing squad.

14 JUSTICE GORSUCH: To change its law,
15 right?

16 MR. HELLMAN: But that does not -- I
17 -- I just want to be clear about what that
18 assertion does in the case. It carries our
19 burden when we prove it that there is an
20 alternative.

21 JUSTICE GORSUCH: I understand that
22 for Eighth Amendment purposes. But it does mean
23 that, as a practical matter, the state cannot
24 carry out the sentence or it must change its law
25 to do so, right?

1 MR. HELLMAN: The reason I say no, if
2 I may, is that if Georgia developed, employed, a
3 method of lethal injection that was
4 constitutionally adequate, they could use it.

5 JUSTICE GORSUCH: It would have to
6 change its method of execution.

7 MR. HELLMAN: That is true, but that
8 would make every method-of-execution claim found
9 in habeas.

10 JUSTICE GORSUCH: I see. Okay. Let
11 -- let's put that aside, all right? Let --
12 let's -- a starker example, one where you would
13 concede hypothetically that Georgia would either
14 have to change its law or change its sentence.
15 Then what?

16 MR. HELLMAN: If Georgia has to change
17 its law to carry out the sentence and the method
18 of execution is not part of the sentence, as it
19 is not in Georgia --

20 JUSTICE GORSUCH: So it doesn't make
21 any difference?

22 MR. HELLMAN: It -- it goes to the
23 feasibility perhaps.

24 JUSTICE GORSUCH: Still goes to 1983,
25 doesn't go to habeas then?

1 MR. HELLMAN: And -- and -- and I'm
2 saying that not because it's my preference. I'm
3 saying that because Section 1983 is the cause of
4 action going back for 150 years for how --
5 that -- that you use when the -- when you
6 concede the validity of a sentence but ask to --
7 for an injunction against carrying it out in an
8 unconstitutional way.

9 JUSTICE GORSUCH: I just wanted to
10 test the boundaries of your argument. I
11 appreciate that. Thank you.

12 MR. HELLMAN: Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: So, as Justice
16 Sotomayor was pointing out, one of the
17 difficulties with this kind of claim is the
18 ripeness concern if we were to say that it must
19 proceed in habeas.

20 And on page 50 of the state's brief,
21 the state says that there would be an avenue for
22 pursuing that kind of claim in state court and
23 state post-conviction proceedings, and I just
24 wondered if you had a reaction to that.

25 MR. HELLMAN: I -- I -- I do. With

1 respect to my friends, method-of-execution cases
2 cannot be brought in Georgia post-conviction
3 proceedings. What -- what the red brief talks
4 about on page 50 is the notion that the second
5 and successive bars under Georgia
6 post-conviction rules are less stringent than
7 they are under what's enacted in AEDPA, but
8 there's -- it has to be the right kind of claim
9 to be brought into habeas in the first place.

10 And as I believe we point out in -- in
11 our brief, I -- I can get you the page citation
12 -- Georgia, as a matter of Georgia
13 post-conviction law, a claim challenging how
14 Georgia carries out its execution is not
15 cognizable in state post-conviction. So your --
16 the courthouse doors are closed. I know we've
17 used that metaphor a lot, but they are.

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. HELLMAN: Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Ms. Hansford.

23 ORAL ARGUMENT OF MASHA G. HANSFORD

24 FOR THE UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING THE PETITIONER

1 MS. HANSFORD: Mr. Chief Justice, and
2 may it please the Court:

3 There's no sound reason to carve off
4 claims like Petitioner's from the general rule
5 that method-of-execution challenges must proceed
6 under Section 1983. And to Justice Kavanaugh
7 and Justice Kagan's questions, a dual track
8 system would add procedural complexity, creating
9 delay and inviting gamesmanship.

10 For instance, a claim that alleges
11 multiple alternatives could proceed in separate
12 actions in different venues, or a case may have
13 to restart in a different court if a prisoner
14 amends his complaint or if an appellate panel
15 revives an alternative rejected by the Court.

16 And there's no compelling doctrinal
17 reason for that approach. In fact, it would
18 expand the scope of habeas to hold that a purely
19 state law problem that does not invalidate a
20 criminal judgment can somehow transform an
21 action into a core habeas claim.

22 I welcome the Court's questions.

23 JUSTICE ALITO: Suppose we were to
24 agree with the state in this case. In what way
25 would the interest of the federal government be

1 adversely affected?

2 MS. HANSFORD: Absolutely, Justice
3 Alito. We do think that the determination in
4 this case as to whether this is a core habeas
5 claim would also apply to the federal
6 government. The federal government -- of
7 course, federal prisoners do not use Section
8 1983, but they use the APA. And in the
9 method-of-execution litigation that the federal
10 government handled in 2020 and 2021, the
11 prisoners did use the APA. Many claims were
12 joined together.

13 At some point in that suit, the
14 prisoners added a firing squad alternative, and
15 we do think that if there were a dual track
16 system, there would have been all kinds of
17 procedural complications to what was already a
18 very complicated and difficult litigation that
19 would have made it substantially more difficult.

20 JUSTICE SOTOMAYOR: Can I follow up on
21 that as I know, there are 10 states that -- like
22 Georgia who allow -- who specify one method in
23 their law, and there are seven states who allow
24 multiple methods.

25 So your point is, if we rule in

1 Respondents' favor, we're going to have this
2 patchwork of similar identical issues on a
3 particular method of -- of execution, perhaps
4 around different states, some going into 1983
5 and some going into habeas.

6 MS. HANSFORD: That's right, Justice
7 Sotomayor. The states vary widely, and there
8 are some states like Florida and Alabama that
9 actually just include a safety valve. They say
10 our preferred method is lethal injection, also
11 electrocution, but if both of those are
12 unconstitutional, any constitutional manner is
13 fine.

14 The same claim would always be a
15 Section 1983 in those suits. And so there would
16 be very different treatment. And I -- I -- I
17 guess one -- one thing I would note on that is,
18 to the extent that the states may benefit in the
19 short run from additional AEDPA protections,
20 I -- I -- if the trend is for more states to do
21 what Alabama recently did and to add such a
22 catch-all, that would be a -- a pretty
23 short-term benefit, but I think the -- the
24 practical downsides in terms of creating this
25 procedural complexity and the back-and-forth

1 rerouting which prisoners can use to delay
2 executions, I think, would last for a long time
3 and is very concerning to the government.

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

6 JUSTICE ALITO: Would you agree with
7 Mr. Hellman that it wouldn't matter if the
8 Georgia constitution said that the only
9 permissible method of execution is lethal
10 injection?

11 MS. HANSFORD: Justice Alito, I
12 wouldn't say it doesn't matter. It doesn't
13 matter to the procedural question, the
14 procedural question it should still be 1983.

15 It may well be relevant to the merits
16 inquiry. We take the Court's decision in
17 Bucklew to say that invalidity under state law
18 is not per se rendering something invalid, but I
19 think, if it would be particularly difficult to
20 amend state law, it's not clear to us that a
21 court should close its eyes to that while taking
22 into account other reasons that an alternative
23 would be difficult to implement, like licensing
24 and other concerns.

25 So we think there may be a state --

1 there may be a role for that in the merits
2 analysis.

3 JUSTICE ALITO: Well, I don't really
4 understand that. I really don't understand that
5 answer. If the question is whether the -- the
6 granting of a claim makes it impossible to
7 execute the judgment, I mean, I think both sides
8 have to figure out where to draw the line.

9 But your argument is it goes all the
10 way. If it's -- even if it would require an
11 amendment to the state constitution, it doesn't
12 matter?

13 MS. HANSFORD: That's right, Justice
14 Alito. We think that because the judgment would
15 plainly remain valid under Georgia law, it is
16 not a habeas claim, and then how difficult the
17 alternative would be to implement by a state
18 taking measures within its control really just
19 goes to the merits of the inquiry.

20 And I -- I -- I think one of the
21 things that's difficult in this case is the
22 intuition that it's hard to see a lethal
23 injection challenge succeeding on the merits.

24 So maybe just to abstract away from
25 that and to give you an example that is not at

1 all realistic for what states actually do, but
2 if a state were to adopt either as a statutory
3 matter or put in its constitution that the
4 method of execution is, say, burning at the
5 stake, and a prisoner who says I agree that the
6 death sentence is valid, my judgment is valid,
7 but I should be -- but burning at the stake
8 super adds pain relative to lethal injection.

9 The fact that the state would then
10 have to take a step and if it wanted to carry
11 out the execution in a constitutional manner
12 amend its law, then that does not change the
13 nature of the claim and does not make it a
14 habeas --

15 JUSTICE ALITO: You think it would be
16 hard for a prisoner to challenge that in habeas?

17 MS. HANSFORD: I -- I -- I -- I -- so
18 I'm not making a courthouse-gates-being-closed
19 type of argument. I'm just saying that as a
20 conceptual matter, because habeas is about the
21 validity of the judgment, I think it's clear
22 that that is not an attack on the validity of
23 the judgment but just the manner of carrying out
24 that judgment.

25 JUSTICE ALITO: But doesn't that

1 depend on state law, whether it's an attack on
2 the validity of the judgment or not?

3 MS. HANSFORD: Yes, it does, Justice
4 Alito.

5 JUSTICE ALITO: Okay.

6 MS. HANSFORD: So we do think that a
7 state has the power to define its judgment and a
8 state could choose to define -- to -- to define
9 the judgment to include the manner of execution.
10 We agree with Petitioner that no state has done
11 this. I think the ACLU brief is helpful in
12 laying this out.

13 That would have all kinds of important
14 implications for retroactivity, for resetting
15 collateral time, and I think that the state
16 constitution example probably as a practical
17 matter is a little bit unrealistic for the same
18 reasons. States have repeatedly made executions
19 more humane, and they don't want to make it
20 difficult to change methods of execution.

21 JUSTICE ALITO: Well, if it's a
22 question of state law, then what do we say about
23 Georgia law? Well, we predict that Georgia will
24 do what all these other states have done? Is
25 that what we -- we're supposed to do?

1 MS. HANSFORD: Justice Alito, no
2 prediction is needed. The Georgia Supreme Court
3 has said in Dawson that judge -- the judgment is
4 not void when the manner of execution changes.

5 In fact, the manner of execution
6 changed from electrocution to lethal injection
7 with that decision. And not only does
8 Petitioner's judgment in this case not specify a
9 method of execution, even in Georgia cases where
10 judgments did specify the method of execution,
11 Georgia courts have held that the sentence could
12 proceed without resentencing.

13 And I think that's really critical to
14 illustrating that what is at issue is not the
15 validity of the state's judgment. And I do
16 think that's the one place where state law is
17 relevant because habeas is about what the
18 judgment is, and the state does have the power
19 to define that.

20 JUSTICE GORSUCH: I'm sure it's just
21 me, but I guess I'm a little confused. Could a
22 state make the method of execution part of its
23 judgment in such a way that any attack on it
24 would be required to go to habeas?

25 MS. HANSFORD: Yes, Justice Gorsuch.

1 JUSTICE GORSUCH: How -- how would
2 that happen on your view?

3 MS. HANSFORD: So a state could say we
4 define the punishment for the offense to be
5 execution by lethal injection.

6 JUSTICE GORSUCH: So, if there were a
7 state law saying that, that would be sufficient?

8 MS. HANSFORD: That's right, Justice
9 Gorsuch. Or if the state court held that maybe
10 just looking at the particular statutes, that it
11 viewed the method as inseparable and so
12 resentencing is required every time a method of
13 execution is changed. So, as a matter of
14 federal law under the Malloy decision, that is
15 not required, but a state could say we see
16 Malloy, but we disagree.

17 Now the states have actually gone in
18 the opposite direction --

19 JUSTICE GORSUCH: No, I understand
20 that.

21 MS. HANSFORD: -- in several cases.

22 JUSTICE GORSUCH: I understood that
23 point. So I guess it really does boil down to
24 what Georgia law says here then?

25 MS. HANSFORD: I -- I think that if --

1 if there -- if Georgia law here defined the
2 method of execution as part of the judgment and
3 it's crystal-clear -- I -- I would submit that
4 it doesn't -- then I do think the outcome would
5 be different.

6 JUSTICE GORSUCH: Okay. And what do
7 we do about the fact that in the verdict form
8 the jury indicated it would be death by lethal
9 injection?

10 MS. HANSFORD: So, Justice Gorsuch,
11 it's unclear what that meant on the verdict
12 form. It was part of the language on the
13 verdict form, but it's not clear what that meant
14 because lethal injection was the only
15 statutorily authorized method. And so -- and
16 the judgment didn't repeat those words.

17 But I think the reason that that feels
18 significant is that it seems like it may suggest
19 that Georgia is a state that actually defines a
20 sentence to be death by lethal injection. And,
21 in fact, we know from the Supreme Court
22 decision, from the practice when method of
23 executions have changed in the past, and from
24 the language of Petitioner's actual judgment,
25 that that is not the case.

1 JUSTICE GORSUCH: What do we do about
2 the common law history as well that, you know,
3 the death sentence manner of execution was often
4 typically part of the death sentence?

5 MS. HANSFORD: Justice Gorsuch, if the
6 Malloy decision had come out the other way based
7 on that common law --

8 JUSTICE GORSUCH: On ex post facto.
9 Yeah.

10 MS. HANSFORD: -- under ex post fact,
11 I think -- I think that would have been an
12 argument for that, but I think it's -- it's
13 clear that, as a matter of federal law, it is
14 not part of the sentence.

15 JUSTICE GORSUCH: Yeah, I wasn't
16 asking as a matter of federal law. I was asking
17 about common law. But maybe you don't have any
18 thoughts on that, and that's fine.

19 MS. HANSFORD: Yeah, I -- I -- I -- I
20 -- I -- I don't. I think that the -- the Malloy
21 decision has crossed that bridge.

22 JUSTICE GORSUCH: All right. Thank
23 you.

24 JUSTICE KAVANAUGH: I just want to
25 caution one answer -- about one answer you gave

1 to Justice Alito because I don't think it's that
2 big of a box. This doesn't defeat your
3 argument, but you said, I think, that the
4 difficulty of changing state law could come in
5 on the merits of the 1983 claim.

6 Well, if you took that to its logical
7 conclusion, if the state constitution said
8 burning at the stake is the only method, that
9 would mean you couldn't maintain a Bucklew claim
10 against that. And I don't think that's right.
11 As I said in the Bucklew oral argument and
12 opinion, I don't think that can be right.

13 MS. HANSFORD: So, Justice Kavanaugh,
14 we don't have a position on the particulars of
15 how the merits inquiry should play out. We
16 think this Court hasn't -- hasn't developed that
17 further.

18 We -- we recognize there are difficult
19 questions on both sides, and we take Bucklew to
20 say that kind of the standard basic difficulty
21 of changing the law isn't enough, but we do
22 think that the option is open to potentially
23 take into account if there are some extreme
24 difficulties.

25 Now I will say it's extremely unlikely

1 that this would come up because the Bucklew
2 standard is so rigorous on the merits. So, in
3 addition to the protections from 1983, including
4 the PLRA, which, Justice Gorsuch, does require
5 exhaustion for 1983 prisoners, there is that
6 very demanding standard.

7 And the -- the alternative has to be
8 feasible and readily implemented. It has to
9 significantly reduce a substantial risk of
10 severe pain, which is where a lot of these cases
11 can drop out more easily. And the state has to
12 not have a legitimate penological reason.

13 So, if something is so important to
14 the state that it's in the constitution, perhaps
15 there would be a legitimate penological reason.
16 It's hard to imagine the state codifying just
17 one method of execution for no particular
18 reason. But, you know, if the state does
19 something extreme like in the
20 burning-at-the-stake example, then it does seem
21 like -- that the answer should probably be that
22 that case --

23 JUSTICE KAVANAUGH: Yeah. Back to --

24 MS. HANSFORD: -- that should go
25 forward on the merits.

1 JUSTICE KAVANAUGH: -- current
 2 statutes and the way current state statutes are
 3 phrased, I think what you were just saying is
 4 most of these claims go out on the -- the first
 5 prong and you don't -- am I right about that, or
 6 am I wrong about that?

7 MS. HANSFORD: I think --

8 JUSTICE KAVANAUGH: The first prong
 9 being you haven't shown severe pain as
 10 shorthand.

11 MS. HANSFORD: I think -- I think that
 12 is where a lot of the -- of the activity is.
 13 And that's one of the reasons the dual track
 14 system would be so unwieldy because that is the
 15 same question, regardless of the alternatives,
 16 and then splitting the claim up to litigate
 17 whether the firing squad is readily implemented
 18 versus a different protocol really does not make
 19 a lot of sense and creates the possibility for
 20 competing stays being entered, which -- which is
 21 also not helpful to the litigation.

22 And just to say one more thing on the
 23 protections that are available even under
 24 Section 1983, I just want to emphasize the very
 25 important protection of the limits this -- this

1 Court set out in Hill on the stays. And, in
2 fact, I think the Hill -- the aftermath of the
3 Hill case is itself a good example.

4 In that case, of course, the Court
5 ruled unanimously that a Section 1983 action,
6 instead of a habeas action, could proceed. And
7 Florida executed that prisoner less than four
8 months later because the district court said
9 that it was filed too close to the execution
10 date, and so, for that reason alone, the 1983
11 suit could be tossed. And the Eleventh Circuit
12 agreed that it was -- that -- that a stay was
13 not warranted.

14 So there are a lot of protections for
15 the states. We don't want to in any way suggest
16 that the state's sovereignty considerations are
17 not significant here. But we -- we just submit
18 that that's not the test for whether AEDPA
19 applies or not. The application of AEDPA turns
20 on whether the validity of the judgment is being
21 attacked, and in this case, it is not.

22 If there are no further questions.

23 JUSTICE SOTOMAYOR: Counsel, on the
24 common law issue, your adversary cites only one
25 support for that, and that's Blackstone. And

1 the Blackstone treatise states that a sheriff
2 who substituted a different method of execution
3 than one handed down by a judge could be guilty
4 of a felony.

5 That's a different situation than this
6 one. There it suggests that the judgment
7 included a method of execution that a sheriff
8 decided to change, correct?

9 MS. HANSFORD: That's right. And I
10 think the common law is further complicated by
11 the fact that this would often go to the
12 jurisdiction of the court to impose a sentence
13 in the first place. But -- but, again, I -- I
14 think that if Malloy had come out the other way
15 and had held that the method is an inherent part
16 of the judgment for purposes of federal law,
17 then I think we would have a different situation
18 here.

19 JUSTICE SOTOMAYOR: Thank you,
20 counsel.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer, anything further?

23 Justice Alito?

24 Justice Kagan? No?

25 Okay. Thank you, counsel.

1 MS. HANSFORD: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Petrany.

3 ORAL ARGUMENT OF STEPHEN J. PETRANY

4 ON BEHALF OF THE RESPONDENTS

5 MR. PETRANY: Mr. Chief Justice, and
6 may it please the Court:

7 This case is not about whether
8 Petitioner Nance can challenge lethal injection
9 under the Eighth Amendment. He can do that in
10 state court. He can -- excuse me. He can do it
11 in a properly exhausted federal habeas petition.

12 It's also not about the substance of
13 an Eighth Amendment claim, which remains the
14 same in any forum. Instead, it's only about how
15 and where he should file this claim. And, here,
16 he seeks to prevent his custodian from executing
17 him. That is habeas relief, and so it's not
18 cognizable in Section 1983.

19 Execution is a distinct form of
20 custody. That's why prisoners can challenge
21 capital punishment in habeas to begin with.
22 And, here, Nance seeks to bar his custodian from
23 exercising that custody over him. That's habeas
24 relief. It doesn't matter whether someone
25 someday might be able to execute Nance if

1 Georgia were to authorize a different criminal
2 punishment.

3 The relevant point is that he seeks to
4 bar death by lethal injection, the only
5 state-authorized punishment he's actually
6 subject to.

7 Indeed, Congress passed AEDPA for
8 situations just like this one to prevent
9 unnecessary intrusions on state sovereignty.
10 Nance virtually ignores AEDPA and would have
11 states amend their statutes and even
12 constitutions merely to effectuate their
13 criminal judgments, all without AEDPA's
14 protections, including prior state court review,
15 which can resolve many of these cases. That is
16 not what Congress wanted.

17 Simply put, Nance could have filed in
18 state court. He could have filed a 1983
19 complaint that did not seek to bar lethal
20 injection entirely. Or he could have chosen not
21 to abandon his similar claims on
22 post-conviction. But what he can't do is get
23 around AEDPA by challenging his execution via
24 Section 1983.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Counsel, is the
2 method of execution a part of the sentence,
3 capital sentence, in this case?

4 MR. PETRANY: The Court would not need
5 to answer that question. And I strongly
6 disagree with my friend from the other side who
7 says it's clearly not. I think it's unclear
8 under Georgia law whether it is or not.

9 What Georgia courts have said is that
10 when the legislature changes from, say,
11 electrocution to lethal injection, that doesn't
12 require resentencing. That doesn't mean the
13 sentence didn't change in some sense. I mean,
14 the sentence is what the state says it is.

15 And if they change what they say it
16 is, that might be subject to federal constraints
17 in terms of ex post facto and so forth, but
18 there is nothing that says that a state must
19 resentence a prisoner in order to change their
20 sentence.

21 Just to give one example, when
22 Virginia repealed the death penalty recently, by
23 statute they changed all of those sentences.
24 They didn't require resentencing or anything
25 like that.

1 And so I think if you go down the road
2 of allowing these challenges to custody in 1983,
3 the Court is effectively saying we are telling
4 states this is not part of their sentence.

5 JUSTICE KAGAN: Well, Mr. Petrany,
6 doesn't Georgia law itself separate the sentence
7 of death from the method of execution?

8 So I'm just going to read you your
9 statutes and you can tell me whether I've gotten
10 them wrong. But it says, a person convicted of
11 the offense of murder shall be punished by
12 death, by imprisonment for life without parole
13 or by imprisonment for life. That's one.

14 And then there's another provision,
15 just by death. Another provision that says all
16 persons who have had imposed upon them a
17 sentence of death shall suffer such punishment
18 by lethal injection.

19 So your own statutes are clearly
20 saying there's the -- it shall be punished by
21 death, there's the sentence. And if you're
22 given that sentence of death, here's the way we
23 propose carrying it out.

24 MR. PETRANY: So a few points on that,
25 Justice Kagan.

1 First is, I don't think that federal
2 courts should generally be in the business of
3 telling states, well, if you don't write your
4 statutes a certain way, we're not going to
5 consider them to be part of the sentence or
6 something like that.

7 I mean, I think that's for states to
8 say.

9 JUSTICE KAGAN: Well, here you have a
10 statute. It says what it says. Then you also
11 have a Supreme Court decision that makes clear
12 that the ordinary way of reading these words is,
13 in fact, the way Georgia reads these words.

14 And -- and that's why nobody needed a
15 resentencing when you changed your method of
16 execution. So I guess I just don't see what
17 argument you have here.

18 MR. PETRANY: Well, so a couple
19 points, Your Honor.

20 First, I would say, if you go down
21 later in the lethal injection statute it defines
22 participation in a death sentence as only lethal
23 injection-oriented thing. So I think it's very
24 clear that the state understands a death
25 sentence as lethal injection.

1 But even if it didn't, and I think
2 this is the virtue of our approach, habeas isn't
3 about challenging sentences, per se. Habeas is
4 about challenging custody. If you were to
5 challenge, for instance, a criminal fine, you
6 couldn't do that in habeas because it's not
7 custody.

8 And Preiser, which is where the Court
9 began with this doctrine, the sentence was still
10 extant at the end. The extent still existed.
11 The reason that this went into habeas was
12 because the custody was going to be cut short in
13 that case.

14 And so while my friends from the other
15 side focus again and again and again on
16 sentences, they're really talking about a
17 different question. The question is whether
18 custody is being stopped here, not whether the
19 sentence is being vacated.

20 And, in fact --

21 JUSTICE KAGAN: See, I guess I thought
22 our test is always, does this imply, necessarily
23 imply the invalidity of the sentence. And if
24 the sentence is just death, this does not
25 necessarily imply the invalidity of the

1 sentence. Quite to the contrary.

2 Mr. Nance is saying he concedes the
3 validity of the sentence of death.

4 MR. PETRANY: Well, so a couple of
5 points, Your Honor.

6 First, I respectfully just have to
7 disagree. Preiser makes clear, Balisok makes
8 clear, it really isn't a question of is the
9 sentence extant at the end. You might be let
10 out of jail a few days earlier, it's not that
11 there -- there was some problem with your
12 sentence, you're just -- you got let out of jail
13 and so that's -- that's habeas relief.

14 And so similarly here, even if the,
15 you know, the sentence per se still exists in
16 some form, if you no longer can be executed,
17 then that's a bar against custody, but also Heck
18 made clear, and I think the follow-on cases as
19 well, it used the term validity. It didn't use
20 the term vacate.

21 And I think that there was an
22 important point to that. In all of these cases,
23 the question is can I enforce this sentence
24 against you? It's not a matter of well, is it
25 literally being vacated.

1 And -- and none of these cases,
2 actually, neither Preiser, Heck, Balisok, et
3 cetera, was someone asking for vacatur of the
4 sentence. They were just asking for something
5 that would mean the sentence could no longer be
6 validity enforced against them. And that's what
7 he's asking for here.

8 I would also hasten to add, although
9 my friend from the other side now suggests that
10 maybe some sort of lethal injection could be
11 viable, that is not what they said -- what Nance
12 said in his complaint. It's not what he said in
13 his opening brief.

14 103 of the Petitioner's appendix, the
15 relief that he requested was to enjoin the use
16 of any lethal injection at all. So if this --
17 if -- if Nance were to succeed, his custodian
18 could not exercise this custody over him.

19 That is mainline habeas relief. And I
20 think that this focus on the sentence is really
21 an attempt to get away from that particular
22 point. And I also think that it creates a lot
23 of practical problems in terms of looking at
24 state law.

25 In nearly every case, the Court has to

1 look at state law to figure out, well, what's
2 going to be the effect here? Will he be
3 released if we rule this way? Will he not be
4 released? Will he maybe be released?

5 In the capital context, the question
6 should be, well, can he be executed if we rule
7 this way or can the warden no longer execute
8 him? That's the question.

9 The question is not will there need to
10 be a resentencing. And if that's the question,
11 then you get into very complicated questions of
12 separation of powers and what a federal court
13 can say about what a state court sentences are
14 and so on and so forth.

15 JUSTICE KAVANAUGH: Sorry, keep going.

16 MR. PETRANY: But I was just going to
17 say, on the other hand, I think that any
18 practical concerns with our approach are -- are
19 vastly overblown. And I can get into those.
20 But of course, Justice Kavanaugh, if you have a
21 question.

22 JUSTICE KAVANAUGH: You didn't raise
23 this argument in the lower courts, and I think
24 indicated that you had grown accustomed to 1983.
25 Is that correct?

1 MR. PETRANY: Well most --

2 JUSTICE KAVANAUGH: That doesn't
3 preclude your argument here. I'm just -- is
4 that accurate?

5 MR. PETRANY: Yeah, yeah. So Your
6 Honor, most of these cases up until now had been
7 genuine method-of-execution claims, things like
8 don't use this drug, use this drug. And so,
9 yes, we were, I think, accustomed to that.

10 And there are lots of reasons to
11 dismiss Mr. Nance's claim. And so we relied --

12 JUSTICE KAVANAUGH: And it was
13 dismissed here under 1983 because it was too
14 late, right?

15 MR. PETRANY: I'm sorry? I didn't --

16 JUSTICE KAVANAUGH: Because it was too
17 late? There had been delay?

18 MR. PETRANY: Oh, yeah. The -- the
19 primary argument we had was that this -- this
20 has been ripe and known for years. And Nance
21 waited until essentially all of his other
22 litigation options ran out.

23 JUSTICE KAVANAUGH: And the district
24 court was able to deal with that under 1983?

25 MR. PETRANY: It -- it did. Although

1 as my friend on the other side points out, at
2 least one appellate court judge disagreed with
3 --

4 JUSTICE KAVANAUGH: Right.

5 MR. PETRANY: -- that conclusion.

6 JUSTICE KAVANAUGH: So I guess that's
7 -- leads to my bigger picture question, which
8 I've indicated to the other side as well, we've
9 largely shaped the interaction of 1983 and
10 habeas without interpreting a statute here,
11 figuring out where our precedents lead and what
12 makes the most sense in terms of the interaction
13 of the two things, the two routes here.

14 And so we have some discretion, I
15 think, a gray area. And it seems like we've
16 been on a 15-year effort to organize how these
17 method of execution claims should proceed,
18 culminating in Bucklew, which gave pretty clear
19 directions about that and also repeated the Hill
20 versus McDonough thing about undue delay and too
21 late.

22 So I guess my question is why would we
23 upset all of that and create new complications,
24 for example, on the second or successive
25 question as illustrated by Justice Alito's

1 questions earlier, we're going to get into a
2 whole set of complications under that. Why?

3 MR. PETRANY: Well, so a couple of
4 points, Your Honor. First, I don't think this
5 is entirely just kind of a judgment for the
6 Court to make. I think it is looking at
7 statutes.

8 There's 1983. There's AEDPA. And in
9 Preiser the Court held, look the specific
10 controls over the general. So if Congress has
11 indicated a certain thing should happen when
12 there are challenges to custody, that should go
13 under AEDPA.

14 And I think that to the extent that
15 this is a challenge to custody, and that's our
16 argument --

17 JUSTICE KAVANAUGH: Let me supplement
18 and say I think both sides have good arguments,
19 at least plausible arguments about how to
20 characterize the sentence.

21 MR. PETRANY: Well, so, Your Honor, I
22 think that one -- one place to look is AEDPA
23 itself was designed to prevent this sort of
24 piecemeal attack on executions. I mean, the
25 antiterrorism effective death penalty act was

1 designed to get everything into a single federal
2 habeas petition that a petitioner wanted to
3 bring and it recognized that, you know, stuff
4 might come up later, but we think states can
5 handle that.

6 And that's the regime that we want.
7 And so I think that that's one indication of
8 where the Court should go. I also, to just get
9 into some of the supposed practical problems
10 here, I -- I haven't really heard any
11 particularly difficult practical problems.

12 My friend from the United States
13 suggests, well, maybe someone would amend their
14 complaint. That happens a lot. And, yeah, if
15 you amend your complaint and now you have a
16 different claim or a different theory or
17 something, that can change where things go. I
18 mean, to just use Balisok as an example --

19 JUSTICE KAVANAUGH: What about new
20 facts? You know, you -- you've gotten older and
21 you have a new medical condition that will make
22 lethal injection feel like torture?

23 MR. PETRANY: Well, then you -- then
24 you raise that claim, of -- of course. I mean
25 -- and -- and we -- and we think they absolutely

1 can.

2 And to just -- to clarify another
3 point about Georgia law here, because this came
4 up on my friend on the other side's time, the
5 Owen versus Hill case is very clear that what it
6 is talking about is genuine method-of-execution
7 claims that go to drug choice, you know, the
8 sort of things that any warden can handle, not
9 barring lethal injection entirely.

10 But even if that weren't the case,
11 even if Georgia were to someday decide, well,
12 you know, in our own system, we want to put
13 these into a different box, Owen versus Hill
14 makes clear that you can raise those challenges
15 in a declaratory judgment action in Georgia
16 state court. So there is no question that you
17 can raise that claim.

18 The only -- I mean, in a lot of
19 circumstances, of course, it's going to fail
20 because of timeliness or the merits or something
21 like that, but it's definitely cognizable in
22 Georgia state court.

23 And so what this ultimately boils down
24 to is, you know, to paraphrase Justice Scalia,
25 Nance just wants another federal district court

1 to rule on one of his claims.

2 JUSTICE KAGAN: But doesn't what this
3 ultimately boil down to whether Bucklew is
4 completely gutted? I mean, you're suggesting an
5 approach where it's like it's not 1983; it's
6 habeas. Oh, sorry, in habeas, you run into the
7 second and successive bar. You're just never
8 going to be able to bring these claims. Or
9 maybe I should say almost never.

10 And it seems as though that's exactly
11 what Bucklew said should not happen. Bucklew,
12 all nine justices agreed on one point, which is
13 that somebody in Mr. Nance's position was
14 entitled to raise a alternative method of
15 execution that had not been authorized by state
16 law.

17 And the Court said we see little
18 likelihood that an inmate facing a serious risk
19 of pain will be unable to identify an available
20 alternative for that reason, because he was
21 entitled to identify an alternative that was not
22 authorized. There was a concurrence that really
23 underscored that point.

24 And -- and now you're saying, oh,
25 well, you know, really, Bucklew didn't mean what

1 it said, notwithstanding that it said an -- an
2 -- a petitioner is always going to be able to do
3 this. What we meant was a petitioner is
4 technically always going to be able to do this,
5 but in 90 percent, 99 percent of the time, he's
6 not going to have an appropriate vehicle.

7 Now, is that really a -- a reading of
8 Bucklew that would not be, I don't know,
9 embarrassing?

10 MR. PETRANY: No, Your Honor, I don't
11 think that's at all what we're saying. Nance
12 can absolutely file this sort of a claim in
13 state court any times he wants. And, of course,
14 he can file it on his initial post-conviction
15 time, which he did. He filed very similar
16 lethal injection claims. He also included a
17 claim in his federal habeas petition that his
18 counsel was ineffective for failing to raise
19 these sorts of claims. So Nance himself is kind
20 of the advertisement for the fact that these are
21 available all the way along the line.

22 But what I take Bucklew to say is the
23 claim itself shouldn't be hard in terms of
24 finding an alternative, but it specifically left
25 open that where you do that, whether you do it

1 in state court or federal court, might be, you
2 know, a question because if you are going to
3 stop the warden from executing you, period,
4 that's habeas relief.

5 It doesn't mean you can't make that
6 claim. Of course, you can. Georgia courts are
7 wide open to that sort of claim. And I think
8 what AEDPA tells us is, and this Court has said
9 it numerous times, and Congress has certainly
10 affirmed it, that not every single claim gets a
11 federal forum in district court.

12 No matter what, of course, this Court
13 would have certiorari review if there were some
14 extreme breakdown in state court. And in most
15 cases, I think that Petitioners are going to be
16 able to raise these across-the-board
17 no-lethal-injection-whatsoever kind of claims in
18 their first federal habeas petition. But I
19 don't see this as cutting back on Bucklew at
20 all, any more than Heck or any of these other
21 cases cut back on substantive rights.

22 JUSTICE BARRETT: But -- but, you
23 know, on -- so on page 50 of your brief, which I
24 asked your friend on the other side about, you
25 say that there would be a forum in Georgia

1 courts. But would there not be these kind of
2 ripeness problems or second or successive bars?
3 Or I assume that Georgia post-conviction
4 practice has bars that would be analogous to the
5 ones that apply under AEDPA. Is it really the
6 case that the state courts would be wide open
7 for -- you're -- you're saying wide open as a
8 forum. Is that really true in these kinds of
9 claims?

10 MR. PETRANY: I think it is, Your
11 Honor. Of course, if someone has had a ripe
12 claim for eight years or something along those
13 lines and then tries to file it and gets booted
14 out of court, that's not unique to this area of
15 the law. It's not unique to Georgia courts.
16 Federal courts would do the same thing. So
17 there might be timeliness concerns or merits
18 concerns.

19 But Georgia law is very clear there is
20 no time limit for a capital sentence habeas
21 petition. You can file a second or successive
22 one if you have a reason for doing so. And the
23 fact that you couldn't file this claim before
24 would be a good reason. Again, we don't think
25 that's actually the case here, but it is

1 available.

2 And so I don't really see -- there are
3 the ordinary barriers that any capital
4 petitioner is -- for that matter, any habeas
5 petitioner is going to have to deal with in
6 terms of time limits and ripeness and so forth.
7 But nothing about that is -- is distinct in this
8 case as opposed to any other kind of capital or,
9 you know, likewise just imprisonment claim.

10 JUSTICE BARRETT: You say in the
11 footnote on this page that if, in a hypothetical
12 situation, you say that would be unlikely to
13 occur, there were no state forum in which this
14 kind of Bucklew claim could be pressed, that the
15 Petitioner could raise a due process challenge
16 saying, you know, I just had no forum for my
17 claim.

18 What would be the procedural vehicle
19 for asserting that, 1983?

20 MR. PETRANY: Yeah, so I think it's so
21 unlikely to occur there isn't much case law that
22 I could provide for the Court in terms of how
23 here's how it would happen, but I think you
24 could file essentially either a federal habeas
25 petition or a 1983 claim and just say I have no

1 opportunity whatsoever, I never had a chance to
2 do this, and I believe that that violates due
3 process for this, this, and this reason and,
4 therefore, I'm entitled to do this in this
5 forum.

6 I don't think that, you know, the
7 distinction at that point between 1983 and
8 habeas is going to be as important because we're
9 in, again, a -- an unrealistic hypothetical
10 world where you've had no opportunity over the
11 course of, you know, your entire time in prison
12 to bring this sort of a claim.

13 But I think, again, this is getting
14 very far away from what is, in this case, a
15 mainline case. This is a petitioner who says
16 you cannot execute me by the only way you're
17 authorized to execute me. At the end of the
18 case, the warden would not be able to exercise
19 this custody over the Petitioner if he
20 succeeded.

21 That makes it habeas. That makes it
22 AEDPA.

23 JUSTICE SOTOMAYOR: Counsel, how is
24 this different from any of the cases where
25 states have said a particular form of medical

1 treatment is too expensive, we don't have the
2 budget for it?

3 In my estimation, budgets are
4 generally passed by law. The laws have to be
5 changed, and the Court says it's
6 unconstitutional not to do. The state does what
7 it needs to do. Similarly, just in Americans
8 for Prosperity Foundation last year, in a 1983
9 action, we said a California regulation was not
10 a permissible remedy, enjoining a California
11 regulation.

12 All of these things require changes
13 either in state statutory law or regulatory law,
14 and we've never suggested that curing a
15 violation on its face because a law prohibits
16 something stops a 1983.

17 But I just experienced in the news
18 Florida changing its law with respect to one of
19 its state citizens in a matter of weeks, if not
20 days. Is there something that stops Georgia
21 from acting expeditiously if the Court were to
22 rule in its favor? You have lots of reasons why
23 the Court shouldn't in the 1983 action, but
24 let's do the worse.

25 MR. PETRANY: Well, so I think -- as

1 to your first point, Justice Sotomayor, I want
 2 to be clear. We're not saying that 1983 actions
 3 don't reach state law. They do. They just
 4 don't reach state -- or they just don't reach,
 5 excuse me, challenges to custody.

6 So you could have to rewrite your
 7 entire constitution --

8 JUSTICE SOTOMAYOR: Well, that --

9 MR. PETRANY: -- in California or --

10 JUSTICE SOTOMAYOR: -- we get back --

11 MR. PETRANY: -- wherever.

12 JUSTICE SOTOMAYOR: -- to our main --

13 MR. PETRANY: I mean, that's --

14 JUSTICE SOTOMAYOR: -- argument, which
 15 is --

16 MR. PETRANY: That's the --

17 JUSTICE SOTOMAYOR: -- what's the
 18 judgment? Is it custody or is it death? And is
 19 the method of execution separate from that. But
 20 that's assuming that argument, you win on that
 21 argument, which I still have a hard time
 22 understanding how you do because in Dawson, the
 23 Georgia Supreme Court saw the two as different
 24 in the statute.

25 MR. PETRANY: Well, but to be clear,

1 Your Honor, under our theory, we don't think the
2 Court needs to determine that. We do think that
3 the sentence is invalid because --

4 JUSTICE SOTOMAYOR: Well, could you
5 just answer my bottom-line question?

6 MR. PETRANY: Yeah. I -- if you could
7 remind me --

8 JUSTICE SOTOMAYOR: And can you --

9 MR. PETRANY: -- Justice Sotomayor,
10 what the -- what the question is.

11 JUSTICE SOTOMAYOR: -- change a
12 budget, change a law, change a regulation, is
13 there anything that precludes the state from
14 doing that if it were to become necessary?

15 MR. PETRANY: Well, they can do --
16 they can do that. The --

17 JUSTICE SOTOMAYOR: And they could do
18 it in a reasonable amount of time if they chose?

19 MR. PETRANY: I suppose it depends,
20 depending on the -- the hypothetical situation
21 but, yeah, I mean, at -- at some point a state
22 can -- can change its laws, of course, or if
23 it's constitutional, it's going to be very
24 difficult.

25 JUSTICE SOTOMAYOR: You're not

1 suggesting that, unlike the -- our U.S.
2 Constitution, that you need two-thirds of the
3 state to change the law, two-thirds of the --

4 MR. PETRANY: Well, I --

5 JUSTICE SOTOMAYOR: -- districts to
6 change?

7 MR. PETRANY: Your Honor, I can't
8 speak to every state constitution. I am sure
9 some of them are -- are very difficult to amend.
10 But my -- my underlying point is --

11 JUSTICE SOTOMAYOR: Well, this is not
12 a constitutional issue, but I'm asking you.

13 MR. PETRANY: No, here it's not, no.

14 JUSTICE SOTOMAYOR: It's a statutory
15 change.

16 MR. PETRANY: Yeah, I mean, Georgia
17 theoretically could do it, but the warden can't.
18 And the order is going to the warden. I mean,
19 this is an injunction against a particular
20 person who wants to exercise a particular form
21 of custody over Nance. And that's habeas
22 relief. That's classic habeas relief. And
23 that's the bottom of our argument.

24 JUSTICE SOTOMAYOR: Thank you,
25 counsel.

1 MR. PETRANY: I just want to very
2 briefly touch on the second or successive issue.
3 The text of 2244 is exceedingly clear. My
4 friend on the other side has barely even
5 mentioned the text, and I think for good reason.

6 It does not do him any favors. If we
7 -- if the Court were to adopt a rule that said,
8 well, if you couldn't have done this before or
9 if this wasn't ripe at the time of your first
10 habeas petition, we're not going to apply the
11 second or successive bar, we would, in fact, as
12 Justice Alito indicated, just be back in abuse
13 of the writ days.

14 This Court has explicitly acknowledged
15 that's not what Congress wanted. It very
16 specifically picked the first half of a two-part
17 test and said, if it's second or successive,
18 it's barred with these very narrow exceptions,
19 which themselves would be all but meaningless if
20 one adopted Nance's rule in this case.

21 And, again, none of this goes to
22 whether or not Mr. Nance can file this claim
23 somewhere. He is going to be able to file the
24 claim. It's just a question of is it in state
25 court or is it in a federal district court.

1 If the Court has no further questions.

2 JUSTICE BREYER: Well, I do have one
3 question. I mean, what -- what's the
4 prisoner -- these take years, these cases --
5 what's the prisoner supposed to do if the method
6 seems all right when he is sentenced, and then
7 they change it over ten years and now it doesn't
8 seem all right? And he's filed 14 habeas
9 petitions on other matters.

10 Well, can he file this one or not?

11 MR. PETRANY: Well, in -- in federal
12 court, if he's already filed a prior application
13 --

14 JUSTICE BREYER: No, I am just saying
15 to you, in your opinion, if we decide for you
16 and you win, can the individual file the claim
17 that this method they are going to execute me is
18 unconstitutional; can he do it or not?

19 MR. PETRANY: In state court,
20 absolutely. We think he will lose.

21 JUSTICE BREYER: In -- oh, in habeas.

22 MR. PETRANY: Oh, in habeas, no, Your
23 Honor, because he already --

24 JUSTICE BREYER: No, okay. So you're
25 --

1 MR. PETRANY: -- a federal habeas
2 petition, yes.

3 JUSTICE BREYER: -- saying he should
4 file in habeas and, by the way, he can't?

5 MR. PETRANY: Well, Your Honor, he
6 did, in fact, file claims that were very similar
7 to this one.

8 JUSTICE BREYER: No, no, no, no. Take
9 my case. Ten years passes. There was an old
10 way that he didn't object to. Now they changed
11 the law. The new way he does object to.

12 MR. PETRANY: Yes, Your Honor. There
13 are some claims that are not going to be able to
14 be brought in a habeas petition. And this Court
15 has recognized this on numerous occasions. Just
16 --

17 JUSTICE BREYER: Well, that's what I'm
18 saying.

19 MR. PETRANY: Yes. Just --

20 JUSTICE BREYER: It's a new claim. I
21 mean, it's not a new, sorry, it's a new method
22 of execution. He thinks it's torture and it
23 wasn't there before.

24 Well, he filed 15 other habeas
25 petitions. Now he comes to you and says: I

1 have my new habeas petition. Now the method
2 they're actually going to use is torture.

3 And can he do it or not?

4 MR. PETRANY: Not in a federal habeas
5 petition. He could do it under state law where
6 he would have to establish, you know, the -- the
7 merits of his claims. But that is, again,
8 that's not unlike plenty of other claims that
9 drop out because of the way Congress wrote
10 AEDPA.

11 So to just take one example, in *Burton*
12 versus *Stewart*, the Court held that various
13 claims that the Petitioner had were just gone
14 for good because he had already filed and
15 litigated a first habeas petition, and at the
16 time those other claims were not available.

17 He couldn't file them at that time
18 because they were not exhausted yet. So
19 Congress was aware, and this Court has said on
20 numerous occasions that, yeah, every once in a
21 while there is going to be a type of a claim or
22 something that comes up that doesn't get federal
23 district court initial review.

24 And we --

25 CHIEF JUSTICE ROBERTS: Well, y ou --

1 MR. PETRANY: -- trust the process to
2 do that.

3 CHIEF JUSTICE ROBERTS: -- mentioned
4 earlier that -- you're -- you're saying he
5 should go into state court and you mentioned
6 earlier that he was likely -- would be likely to
7 lose there.

8 MR. PETRANY: On the merits, Your
9 Honor, or because he -- his -- you know,
10 everything was untimely, which would be the same
11 in Section 1983. It would be either way. And
12 wherever he goes, we thinks his claims would be
13 untimely. But he has at least got a cognizable
14 cause of action in state court. It's just we
15 think he would lose for other reasons.

16 CHIEF JUSTICE ROBERTS: Okay. Well,
17 he -- you say go there and he is going to lose.
18 And yet you -- you are saying that he can't file
19 in federal court because he filed a prior habeas
20 petition, but the claim was not there when that
21 prior -- prior habeas petition was filed,
22 Justice Breyer's hypothetical about, you know, a
23 change in his medical condition, that it is now
24 a different situation to have lethal injection.
25 And now that does seem like a pretty daunting

1 catch-22.

2 MR. PETRANY: So, Your Honor, two
3 points. First, just to be clear, that isn't
4 actually the case here. It was ripe at the time
5 of his first federal habeas petition, but yes,
6 there are theoretical possibilities of this
7 happening, but Congress was well aware of that
8 and, in fact, the very terms in Section 2244
9 make that clear.

10 The fact that Congress exempted such
11 narrow categories from the second or successive
12 bar shows --

13 CHIEF JUSTICE ROBERTS: But by that
14 you're -- you're assuming that AEDPA, when
15 Congress passed it, they understood that it
16 would have this kind of coverage.

17 MR. PETRANY: I -- well, I think that
18 Congress absolutely knew it would have this kind
19 of coverage. In fact, this was the point of
20 AEDPA.

21 The reason that Congress enacted 2244
22 in its current form was to narrow, and/or to use
23 this Court's terms, make more stringent the bar
24 on successive petitions.

25 Previously at --

1 CHIEF JUSTICE ROBERTS: Well, I know.
2 But this is, I mean, from, you know, on the Ford
3 case, for example, the question of how you want
4 to interpret successive petitions. I mean, I'm
5 sure that you've consulted your interests
6 carefully, but you're going to be confronting
7 difficult challenges if you prevail here.

8 MR. PETRANY: Well, I think that the
9 point of AEDPA was that state courts getting
10 these difficult challenges is what was supposed
11 to happen. I mean, AEDPA was, again, which this
12 Court has confirmed, was Congress's decision
13 that state courts is where almost all of this
14 should happen, and only in extreme circumstances
15 should a federal court be getting involved.

16 And so it's not at all surprising that
17 state courts would be the ones to deal with
18 these constitutional issues. In fact, that is
19 the entire point of AEDPA, was to force them
20 into state courts so that states could, in fact,
21 effectuate their own judgments and in many cases
22 just avoid an unnecessary clash of sovereigns.

23 And that happens all the time. States
24 stay their own executions all the time. They
25 rule for prisoners all the time. So states are

1 more than capable of carrying out their federal
2 constitutional duties. And that was what
3 Congress thought when it passed AEDPA.

4 So it's --

5 CHIEF JUSTICE ROBERTS: Well, tell me
6 again why you're -- you're pretty confident he
7 is going to lose in state court?

8 MR. PETRANY: Well, I think that his
9 claims are untimely. He -- he claims
10 essentially that his veins are problematic and
11 that he's -- and that Gabapentin might interfere
12 with the lethal injection.

13 The veins he has known about for
14 decades. His filings repeatedly, again and
15 again and again, said I have bad veins due to
16 long intravenous drug use and so forth.

17 The Gabapentin, he pleaded that he had
18 started in 2016, which was roughly four years
19 before he filed his 1983 --

20 CHIEF JUSTICE ROBERTS: And you think
21 --

22 MR. PETRANY: -- claims.

23 CHIEF JUSTICE ROBERTS: -- were --
24 were the facts otherwise, this was, in fact, a
25 new condition that developed, I mean, that you

1 -- you -- he would prevail in state court?

2 MR. PETRANY: Well, he would at least
3 get past the timeliness bars. Then he has to
4 make the claim, you know, the Bucklew claim. Is
5 this, in fact, a feasible alternative? Does the
6 state not have a legitimate penological interest
7 in what it's doing? Will lethal injection
8 actually cause the kind of pain that he claims
9 and so forth?

10 You know, he has to win on the merits
11 but, yes, it would be there for him to make that
12 claim as long as he gets it in, you know, on
13 time.

14 JUSTICE KAVANAUGH: Were our recent
15 string of religious advisor cases properly
16 brought -- brought in 1983 to the extent that it
17 required a change in state law?

18 MR. PETRANY: So, Your Honor, as I
19 understand those cases, they didn't require a
20 change in state law. It was just a practice.
21 And so they were, in fact, properly filed in
22 1983.

23 JUSTICE KAVANAUGH: Suppose they were
24 in state regulations that had to be changed,
25 though?

1 MR. PETRANY: Yeah, so, of course,
2 that -- that case isn't actually presented here.

3 JUSTICE KAVANAUGH: Right.

4 MR. PETRANY: And there are slightly
5 --

6 JUSTICE KAVANAUGH: Would -- would --

7 MR. PETRANY: -- different concerns.

8 JUSTICE KAVANAUGH: So if a state puts
9 no religious advisors into the execution room,
10 into the state law starting tomorrow, will those
11 claims now have to be brought in habeas rather
12 than 1983 and then barred?

13 MR. PETRANY: Yes, so I think that
14 they would have to be filed in state court and
15 they would have very good chance of succeeding.
16 And so I think states are very unlikely to
17 handicap --

18 JUSTICE KAVANAUGH: But no -- no
19 federal forum available for that claim?

20 MR. PETRANY: Well, of course, to the
21 extent that, you know, state court goes
22 completely rogue, there's still, you know,
23 review by this Court available at the end, which
24 is what Congress --

25 JUSTICE KAVANAUGH: By federal

1 district court, I should say.

2 MR. PETRANY: Yes. Yes. No.

3 Exactly, no federal district court review in
4 that very unlikely and, as far as I'm aware,
5 like, essentially, you know, never happens kind
6 of circumstance, but I think to --

7 JUSTICE KAVANAUGH: Well, it does
8 point out the oddity, I think, that -- I don't
9 -- I don't know that anyone paused to say, boy,
10 this religious advisor claim should be in
11 habeas.

12 MR. PETRANY: Well, Your Honor, at
13 least as I understand it, it didn't need to be
14 in habeas because it was not, in fact, a legal
15 requirement. It was just something the warden
16 could or could not do.

17 JUSTICE KAGAN: But one could easily
18 imagine -- I mean, you said very rare. One can
19 easily imagine those -- these sorts of
20 requirements appearing in prison regulations,
21 which have the status of law.

22 MR. PETRANY: Well, so it depends --
23 if it's just a policy that the warden can change
24 anytime he wants, then you're not really
25 affecting his authority and his custody.

1 Now, if it is a legal regulation that
2 would, in fact, be something that the warden
3 can't get around, that would change things
4 potentially.

5 But there are two points here. The
6 first is states have no real incentive to make
7 their own judgments harder to effectuate by
8 making parts of them details they don't really
9 care about. If they really care about the
10 details, then maybe they put them into statutes,
11 but, if they don't, you're in a situation where
12 they can't carry out a sentence or something
13 like that because, you know, someone said, I
14 want a -- I want a religious minister in the
15 room, and under state law, they can't have them
16 in there. That means now they can't execute
17 this person.

18 And also, to the extent that there
19 are --

20 JUSTICE KAGAN: It is a little bit of
21 irony you're making Mr. Hellman's point for him,
22 that that's why states, you and others, don't
23 make lethal injection part of the sentence.

24 MR. PETRANY: Well, no. It's -- they
25 do make it part of their law, Your Honor. And I

1 think that to the extent there's any concern
2 about, well, what could states do or so forth,
3 as I understand it, my friend on the other side
4 does not contest that if a state said, well,
5 you'd have to be resentenced, you know, a court
6 would just have to check a box that says, all
7 right, now we're sentencing you to death by this
8 new method or something like that, that that
9 would, in fact, require these to go to habeas.
10 This -- this focus on the sentence, I think, is
11 improper.

12 But states could do everything that he
13 claims they can do under our rule under his rule
14 as well. So I don't see this as any significant
15 departure from what a state could do right now.

16 And, again, they have no incentive to
17 do that. There's a reason that they don't put
18 details they don't care about into their
19 statutes and regulations. There's a reason that
20 Mr. Nance has not been able to come up with any
21 particularly problematic state statute or
22 anything like that, because if then there is a
23 problem with that drug.

24 If you -- if you say in your statute,
25 well, it can only be pentobarbital, well, if

1 they can't get any pentobarbital or if there's
2 something wrong with pentobarbital, then all the
3 executions stop, all the criminal judgments
4 can't be effectuated.

5 JUSTICE BARRETT: Can I ask a
6 clarifying question about the religious advisor
7 one? I -- I -- I'm probably just not tracking
8 the position. But I guess, if a religious
9 advisor claim was brought and we said that it
10 was unconstitutional for the state to have a law
11 or regulation prohibiting a religious advisor
12 from being in the room, why wouldn't the
13 execution go forward then with a religious
14 advisor because the state law would essentially
15 be unenforceable in that situation? Why would
16 it stop the execution?

17 MR. PETRANY: Well, they're not -- to
18 be clear, Your Honor, they wouldn't be
19 conflicting. If the federal court ordered the
20 warden to perform the execution, then, yeah, the
21 -- the state law would kind of have to give way.

22 But what the federal court would be
23 doing was just entering an injunction saying
24 don't execute this person without a religious
25 advisor in the room. And because state law

1 doesn't let him do that, he's just in a
2 situation where he can't execute that person.

3 And to some extent, that explains the
4 big difference between death penalty-like claims
5 and just your ordinary 1983 challenge to, you
6 know, a condition of prison confinement or
7 something, where just because you enjoin some
8 prison regulation or even statute doesn't mean
9 you're releasing the prisoners.

10 JUSTICE BARRETT: Mm-hmm.

11 MR. PETRANY: It's not -- it's
12 understood they're still going to be in prison,
13 whereas here, if you stop them from doing it the
14 only way the state has authorized, well, then
15 the execution just stops, and that's habeas
16 relief.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas, anything further?

20 Justice Breyer?

21 Justice Alito?

22 Justice Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 JUSTICE KAVANAUGH: I have -- sorry --

1 two quick ones just to follow up on Justice
2 Barrett's. If the Court ruled that you had to
3 have the religious advisor present in the room
4 and state law did not allow that, wouldn't the
5 -- I guess I'm -- maybe I'm missing this, but
6 state law would have to change, or I guess the
7 state law just would be deemed unenforceable?
8 That might be her question.

9 MR. PETRANY: Yeah, the state law
10 would have to change in order to carry out the
11 execution. Right? The state doesn't have to
12 change its law. Maybe it could --

13 JUSTICE KAVANAUGH: And your -- and
14 your point --

15 MR. PETRANY: -- it could just not
16 carry out the execution -- the warden could just
17 not carry out the execution.

18 JUSTICE KAVANAUGH: And that would be
19 a habeas situation.

20 MR. PETRANY: Yes. No. Yes, we do
21 think that would be a habeas situation, very
22 unlikely to arise, but, yes, and you would have
23 to go to state court first, then a federal
24 habeas petition after.

25 JUSTICE KAVANAUGH: And second

1 question, don't take it the wrong way, but if
2 you were to lose in this case, is it better for
3 the State of Georgia to lose on the 1983 point
4 or to lose on the second or successive point?

5 MR. PETRANY: Well, it's not
6 necessarily the last question you want to get
7 while in front of the Court, Your Honor.

8 It's hard for me --

9 JUSTICE KAVANAUGH: I'm not saying
10 you're going to. I just want to know --

11 MR. PETRANY: It's -- it's --

12 JUSTICE KAVANAUGH: -- what we're
13 talking about.

14 MR. PETRANY: -- hard for me to say
15 that I have, you know, a preference given that I
16 -- I think we're correct on both issues. I
17 think that it would very much depend on what the
18 Court said about the first question and what the
19 Court said about the second question.

20 If -- if the Court was able to come up
21 with some way on the first question that was --
22 you know, did not damage habeas law, the
23 understanding of habeas as a challenge to
24 custody and all those things, I -- again, I
25 don't think the Court can do that, but then

1 maybe that wouldn't be such a -- you know, such
2 a problem.

3 Similarly, with second or successive,
4 if -- if it was another Panetti-like one-off
5 carveout, that's very different from a rule that
6 says, well, actually, just any claim that wasn't
7 available previously.

8 So it's -- it's very hard for me to
9 say --

10 JUSTICE KAVANAUGH: Yeah.

11 MR. PETRANY: -- but that -- that's
12 the sort of analysis I would be thinking of.

13 JUSTICE KAVANAUGH: Very helpful.
14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Rebuttal, Mr. Hellman?

18 REBUTTAL ARGUMENT OF MATTHEW S. HELLMAN
19 ON BEHALF OF THE PETITIONER

20 MR. HELLMAN: Thank you, Mr. Chief
21 Justice. Just a few quick points.

22 First of all, as to what Georgia law
23 contains, I do refer the Court to Dawson v.
24 State, which is crystal-clear from the Georgia
25 Supreme Court that the method of execution is

1 not part of the sentence of death.

2 And I think my friend on the other
3 side more or less concedes that because he says
4 -- he says it does not matter to his argument
5 because his argument is about custody.

6 Well, let's talk about custody for a
7 moment. Point number one, characterizing this
8 claim as seeking release from custody is odd to
9 say the least to begin with because, of course,
10 the death sentence remains in place and the
11 state may use any legal method of execution to
12 carry it out. That leaves my friend to say but
13 the warden might not be able to adopt particular
14 procedures.

15 Method-of-execution claims of all
16 stripes involve alternatives where there will be
17 a question about what the warden can or cannot
18 do on his own or her own, for example, whether
19 or not the warden could obtain a particular
20 drug, whether or not the warden would need
21 approval from some other regulatory entity,
22 perhaps a federal entity or a state entity, in
23 order to carry out the execution.

24 Making the habeas/1983 question turn
25 on the answer to that inquiry, which will often

1 require factual findings and complicated
2 assessments, is a recipe, as I said at the
3 beginning, for delay, confusion, and
4 arbitrariness in these cases. So we recommend
5 the Court not go down that road, which takes us
6 to Section 1983, which has been here for 150
7 years and provides the tools to courts to deal
8 with dilatory claims, estopped claims, and any
9 -- any other claim that does not warrant relief.

10 All we are asking for is the Court to
11 apply its 1983 precedents and allow this claim
12 to be heard on the merits so that those
13 questions may be determined.

14 We ask the Court to reverse. Thank
15 you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 1:17 p.m., the case was
19 submitted.)

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